STATE OF MICHIGAN

COURT OF APPEALS

BILLIE JEAN WINTERS, Plaintiff-Appellant,	UNPUBLISHED August 31, 2010
v	No. 295369 Mackinac Circuit Court Family Division
JEREMY T. JAMES, Defendant-Appellee.	LC No. 2008-006552-TM

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

In this custody dispute, plaintiff appeals as of right an order of the trial court denying her motion to change custody of the parties' two minor children. We affirm.

The parties were divorced in 1999, and the trial court initially awarded them joint legal custody of the children, with full physical custody given to plaintiff. In 2008, plaintiff wished to move to Colorado for an employment opportunity. In the years prior to this, plaintiff had worked as a server at a seasonal bar and steakhouse in Michigan. Plaintiff initially believed that defendant had agreed to allow her to take the children with her to Colorado. After returning from a weekend out of town, defendant stated that he had changed his mind on agreeing to the move. Eventually, the parties executed a stipulated consent agreement that was entered by the court in October 2008 and provided that defendant would retain temporary physical custody of the children while plaintiff moved to Colorado. The consent order further provided that the issue of custody would be revisited prior to the beginning of the next school year, and if the parties could not reach agreement, they would turn to the courts to resolve the matter. Plaintiff returned to Michigan in April 2009 with plans to permanently reside here. Plaintiff filed a motion to dissolve the consent order or to change custody in June 2009, which the court denied following an evidentiary hearing.

Plaintiff first argues that the trial court erred in refusing to set aside the October 21, 2008, consent order because it was invalid as it modified custody without an evidentiary hearing and without an analysis of the statutory best interest factors. All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

The Child Custody Act (CCA), MCL 722.21 *et seq*., "governs child custody disputes between parents, agencies, or third parties." *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005) (quotation marks and citations omitted). The purpose of the CCA is to promote the best interest of children, and it is to be liberally construed. MCL 722.26(1); *Frame v Nehls*, 452 Mich 171, 176; 550 NW2d 739 (1996). The act creates presumptions and standards by which competing custody claims are judged and sets forth the procedures and reliefs available. *Ruppel v Lesner*, 421 Mich 559, 565; 364 NW2d 665 (1984); *Mason*, 267 Mich App at 194. Above all, custody disputes are to be resolved in the best interest of the child, as measured by the factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).

While courts have often spoken of the desire to promote a party agreeing to temporarily and voluntarily relinquish custody, see *Theroux v Doerr*, 137 Mich App 147, 150; 357 NW2d 327 (1984), the court must nonetheless independently determine that the agreement is in the best interests of the child, *Phillips v Jordan*, 241 Mich App 17, 22-24; 614 NW2d 183 (2000). Moreover, in *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005), the Court was clear that "[a]n evidentiary hearing is mandated before custody can be modified, even on a temporary basis." Here, a hearing regarding the best interests of the children was not held prior to entering the consent order, and the only mention of the children's best interests in the consent order was that both parties intended to limit disruption to the children's academic and social lives by changing physical custody to defendant while plaintiff moved to Colorado. This consideration was inadequate to meet the demands of MCL 722.27(1)(c), which provides that a trial court "shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."

However, neither party protested the validity of the order at any time before the trial court, and the parties proceeded for nearly a year under benefit of the order until plaintiff returned and sought restoration of full custody. Nearly a year after the consent order, the court held a full evidentiary hearing where the parties were able to present all evidence concerning custody. Under these circumstances, we are satisfied that the goals of the CCA were met.

Next, plaintiff argues that the trial court erred in not returning physical custody of the children as contemplated in the consent order. However, the court did fulfill the role that the parties contemplated when they composed the agreement, and there was no expectation under that agreement that custody would necessarily be returned to plaintiff.[1]

Plaintiff also asserts that the trial court erred in favoring defendant with regard to best interest factors (b), (d), and (e), finding the parties equal on factor (j), and in not favoring plaintiff on factor (i). Before addressing the merits of this argument, we note that the court

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[1] The consent agreement did not specify that it was establishing a time-limited arrangement. Rather, it provided for the parties to revisit the custody issue prior to the beginning of the next school year, for both parties to make proposals regarding custody, and to allow the court to resolve any dispute concerning custody.

utilized the wrong standard of proof when analyzing the best interest factors. The court stated that it was utilizing a preponderance of the evidence standard. Whether an established custodial environment exists is a question of fact that the trial court must address before it determines the child's best interest. *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007); *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). As indicated, if the court finds that an established custodial environment exists, it cannot change the established custodial environment unless it finds clear and convincing evidence that a change in custody is in the child's best interest. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008).

Here, the trial court found that an established custodial environment existed for the children with both parties. Where there is a joint established custodial environment, neither parent's custody may be disrupted without clear and convincing evidence. *Sincropi v Mazurek* (*On Remand*), 273 Mich App 149, 178; 729 NW2d 256 (2006), citing *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). In this case, the court committed clear legal error in utilizing a preponderance of the evidence standard as its burden of proof. See *Fletcher*, 447 Mich at 881. Nonetheless, the necessary conclusion stemming from the court's conclusion that the lower standard had not been met is that the higher standard was also not satisfied. Accordingly, reversal on this error is not required.

MCL 722.23 sets forth the statutory best interest factors:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor and the failure to do so is reversible error. *Rittershaus*, 273 Mich App at 475; *Daniels v Daniels*, 165 Mich App 726, 730; 418 NW2d 924 (1988). Even in fairness to the parties this standard cannot be altered. *Soumis v Soumis*, 218 Mich App 27, 34; 553 NW2d 619 (1996).

The court found that factor (b) slightly favored defendant. The court reasoned that, although both parties had the capacity to give the children love, affection, and guidance, defendant had the children involved in church and plaintiff did not. Plaintiff contends that the parties are equal on this factor because plaintiff did nothing to interfere with defendant's religious activities, and plaintiff had the children baptized when they were young. However, plaintiff testified that she was not raising the children in her family's traditional faith, while defendant testified to having the children routinely attend church and that the children were enthusiastic about their involvement in youth group. Defendant also stated that plaintiff did not take the children to church, and opposed the children being involved in church. The evidence does not clearly preponderate in the opposite direction to the court's finding on this factor.

The trial court found that factor (d) also favored defendant, noting that the children had lived with defendant in a stable home for about a year at the time of trial and that plaintiff was residing in her mother's home with her boyfriend. The court found that plaintiff was evasive regarding future plans with her boyfriend, and that testimony of a land contract for plaintiff to purchase the home from her mother was "not entirely credible." Plaintiff counters that the court erred with regard to factor (d) because the court did not consider the 11 years that plaintiff had primary physical custody of the children, living for many years with them in her mother's home, and that there was no evidence that plaintiff was evasive about her romantic relationship or could not maintain payments on a land contract.

The trial court's finding on factor (d) was not against the great weight of the evidence. The trial court stated that the children had been residing with defendant for approximately one year, defendant had stable employment, and had renovated his house to accommodate those living there. While there was no specific testimony to indicate that plaintiff's housing situation and romantic relationship were unstable, the trial court found that plaintiff's testimony about her future plans with her boyfriend and for living arrangements "was not entirely credible." It found plaintiff to be "evasive" about her boyfriend. And, because plaintiff failed to admit into evidence a land contract to purchase the family home, it questioned the existence of a land contract. We must defer to the trial court's superior opportunity to assess the credibility of the witnesses and weigh the competing evidence. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *Vollrath v Vollrath*, 163 Mich 301, 303; 128 NW 190 (1910).

Moreover, the trial court did not err by declining to consider the several years during which plaintiff previously had primary physical custody of the children. MCL 722.23 directed the trial court to consider "the desirability of *maintaining continuity*" with respect to the children's living arrangements and environment (emphasis added). Given this statutory language, the Legislature intended the children's present or current living environment to be a court's primary consideration under factor (d). Thus, the trial court properly confined its analysis under factor (d) to the children's then-existing living environment with plaintiff.

Plaintiff next argues that the court erred in finding that factor (e) favored defendant. The court reasoned that defendant had been remarried for seven years and lived in the same residence for two years while renovating it to accommodate the children. The court also found that both defendant and his wife worked schedules that allowed them to be home in the evening. The court contrasted these findings with plaintiff's ability to maintain housing at her mother's home and the relationship with her boyfriend. Plaintiff contends that permanence between plaintiff and the children was established between 1999 and 2008, that plaintiff was able to be home in the evening with the children, and that plaintiff's relationship with her boyfriend was irrelevant.

While considering factor (e), the court may not consider the acceptability of the custodial home as a family unit, but only the permanence. *Ireland v Smith*, 451 Mich 457, 464; 547 NW2d 686 (1996), adopting the analysis in *Fletcher*, 447 Mich at 884-885. The focus of factor (e) is the children's prospects for a stable family environment, which could be affected by disruptions such as moves to unfamiliar settings, a succession of persons residing in the home, or live-in romantic companions for the custodial parent. *Id*. at 465, 465 n 9. Here, it was not against the great weight of the evidence to conclude that the permanence of the family unit offered by defendant, who had been remarried for several years, was greater than the permanence offered by plaintiff, who had a live-in boyfriend and no permanent commitment other than his gift to her of a promise ring.

Plaintiff next argues that the court erred regarding factor (i), because the court stated only that it was considered and plaintiff believed it should have favored her. The judge indicated that he met with the children and took their expressed preferences into consideration. The court must only state on the record that the children's preference was considered by the court, and need not violate the children's confidence by disclosing their choice. *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), aff'd in part, rev'd in part on other grounds, and remanded 447 Mich 871 (1994). There was no error regarding factor (i) because the court fulfilled these requirements.

Plaintiff also argues that factor (j) should be weighed in her favor. The court found that factor (j) favored neither party because both parties struggled to communicate with each other regarding the children, affecting the ability to encourage a close relationship with the other parent. Plaintiff argues that defendant has made no attempt to foster a relationship between the children and plaintiff, and does not communicate with plaintiff.

However, there was testimony that plaintiff's behavior did not encourage a close relationship between defendant and the children. Defendant testified that plaintiff limited his visits with the children while she had them for an eight-week period during the summer, and that plaintiff only wished to communicate by means of text message. Defendant testified that plaintiff did not respond to requests to meet with or speak with him to arrange a parenting time

schedule during the summer the children were with plaintiff. This evidence demonstrates support for the court's findings, which were not against the great weight of the evidence.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering